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No. 01-1842

In the Supreme Court of the United States

AMERICAN RELIABLE INSURANCE COMPANY,
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,
AND CAMPBELL INSURANCE SERVICES, INC.,
Petitioners,

v.

ROBERT STILLWELL AND HELEN STILLWELL,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

PETITIONERS' REPLY BRIEF

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RULE 29.6 STATEMENT

There is no change to the Petitioners' Rule 29.6 corporate disclosure statement as set forth in the Petition for Writ of Certiorari.

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PETITIONERS' REPLY BRIEF

Conspicuously absent from Respondents' opposition is any citation to a West Virginia statute or state supreme court decision which provides a person in the West Virginia state court system with the *right* to appeal from a trial court order denying a motion to compel arbitration or to stay judicial proceedings under the FAA. The reason for this glaring omission is simple – no such statute or case law exists. West Virginia has refused to provide a right to appeal as set forth in section 16(a)(1) of the FAA and implemented by approximately 45 other states.[1] Instead, West Virginia continues to destroy federally protected arbitration rights by forcing persons who suffer an erroneous trial-level arbitration ruling to endure full blown civil litigation and a trial on the merits. West Virginia will continue to thwart federal law under the FAA in direct conflict with this Court's decision in *Southland Corp.*,[2] section 16 of the FAA, and the decisions of other state supreme courts,[3] unless this Court grants the Petition.

The Respondents offer no colorable argument for denying the Petition. Instead, they interpose an irrelevant and misleading discussion of a *separate* federal district court proceeding which, if anything, illustrates why the Petition should be granted,[4] and they falsely contend that Petitioners

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[1] *See* Petition for Writ of Certiorari ("Petition") at 14-15 & nn. 6-7; *id.* at 10-11.

[2] *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984) ("to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate").

[3] *See* Petition at 10–11 and cases cited therein.

[4] On May 18, 2001, prior to the state court's ruling on the motion to compel arbitration, the Petitioners filed a petition in the U.S. District

(continued...)

have "misrepresented" the holding and effect of the West Virginia Supreme Court's decision in this case. The Respondents' arguments are entirely without merit.[5]

I. There Is No Question That The West Virginia Supreme Court In This Case Refused To Provide An Appeal To Review The Merits Of The Trial Court's Arbitration Order, Nor Is There Any Question That West Virginia Refuses To Recognize A Right To Appeal From An Order Denying A Motion To Compel Arbitration Under The FAA

The Respondents contend that, "[f]ar from denying an appeal," the West Virginia Supreme Court actually "*invites*" an appeal, and the state supreme court intends "to consider federal law if and when the record below is sufficiently mature to allow a reasoned determination." Opp. 3 (emphasis in original). This

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[4] (...continued)
Court for the Northern District of West Virginia to compel arbitration and stay judicial proceedings pursuant to sections 3 and 4 of the FAA. Because the state court ruled on June 11, 2001, the district court subsequently dismissed the independent federal action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, finding that the federal petition would be the "'functional equivalent' of an appeal from the June 11, 2001 state court decision." App., *infra*, 9a. The federal district court's refusal to entertain an independent action under the FAA makes it even more important that the state court provide an immediate appeal from the trial court's arbitration order.

[5] As discussed *infra*, the Respondents also argue, contrary to this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), that the clause is unenforceable because it does not allow them to pursue a class action; and they argue that the trial court's order is "consistent" with federal law (Opp. 7) by completely ignoring the conflict with *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (discussed at pages 19 to 20 of the Petition).

argument is unsupportable. There is absolutely no basis for suggesting that the West Virginia Supreme Court is "inviting" another interlocutory appeal. The West Virginia Supreme Court refused to hear an appeal on two separate occasions – once on a petition for writ of prohibition, and a second time in connection with a petition for appeal. Petition at 8-9. The West Virginia Supreme Court did not remand with any instructions to the trial court to reconsider its arbitration ruling or to determine any additional facts, and the record is clear that there are no "issues of fact and of state law" which need to be determined. Opp. 3 (*quoting* West Virginia Supreme Court's decision, Petition, App. 14a). To the contrary, the trial court made a final ruling that it was not going to compel arbitration,[6] and the state supreme court plainly refused to review that decision. In addition, the state supreme court refused to review the trial court's failure to stay judicial proceedings, a ruling which is also immediately appealable under section 16(a)(1)(A) of the FAA.

There is no question that the West Virginia Supreme Court in this case denied any review on the merits and let stand a trial court order which had held that the arbitration provision at issue was unenforceable because it was "not bargained for." Petition, App. 1a. The trial court had further determined without basis in law or fact that the FAA "does not apply" in this case. *Id.* at 4a. Both of these rulings were directly contrary to federal law. Petition at 19-21, 12-13. The integrity of the FAA requires that both holdings be subject to immediate review, but the West Virginia Supreme Court "held" that the Petitioners did

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[6] The trial court also refused to certify its order for interlocutory appeal under W. Va. Code § 58-5-2 "because such certification would result in a stay of discovery which the [trial] [c]ourt [was] reluctant to grant." Petition, App. 4a. The trial court further held that it "ha[d] decided that the Federal Arbitration Act does not apply to this action," and it "decline[d] to reconsider its June 11, 2001 order." *Id.*

not have a right to any such appeal.[7] It is this interpretation of its own procedural rules in derogation of federal rights which is preempted by the Supremacy Clause and which should be reviewed by granting the Petition.

The issue here is not whether an appeal should be provided at the end of the litigation process, but whether an immediate interlocutory appeal – like the mandated by §§ 16(a)(1)(A) and (B) of the FAA – is required in order to avoid frustration and derogation of the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). That three justices of the West Virginia Supreme Court characterized the arbitration issue as "premature" as a subterfuge for denying review (Opp. 3), manifests only that this majority harbors a legally erroneous view of when an anti-arbitration decision must be reviewed in order to safeguard federal arbitration rights. The FAA and the Supremacy Clause require that the order be reviewed immediately without delay in order to protect "the core purpose of a contract to arbitrate." *Southland Corp.*, 465 U.S. at 7-8.[8]

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[7] Respondents make the absurd accusation that Petitioners "misrepresented" that the West Virginia Supreme Court "held" that it was not required to provide an immediate interlocutory appeal. Opp. 4. Notwithstanding Respondent's misguided view, *that is exactly what the state appellate court held*, especially in light of the fact that Petitioners argued expressly to the West Virginia Supreme Court (twice – once in the petition for writ of prohibition, and again in the petition for appeal) that the state court was required by the FAA to provide an appeal, and a majority of the state supreme court (3 to 2) rejected the argument and refused to provide the appeal.

[8] This Court should note that there is no guarantee that the West Virginia Supreme Court will *ever* review on appeal the merits of the trial court's order denying arbitration in this case (or any other case), even after final judgment. All appeals to the West Virginia Supreme

(continued...)

The Respondents also argue without support that "the West Virginia Supreme Court of Appeals grants appellate review appropriately in arbitration cases." Opp. 5. To the contrary, West Virginia rarely grants any useful review of arbitration denials, and most importantly, it did not do so here.[9] Persons with binding arbitration agreements who are aggrieved by trial court error in West Virginia are inevitably bogged down in a quagmire of litigation. Not only does West Virginia not provide any clear appeal as of right, but it presents three different confusing and overlapping appellate "possibilities," all of which are purely discretionary.[10] The aggrieved person can pursue all three options and still not obtain any review of the arbitration order. That is exactly what happened to the Petitioners here. Petition at 7-9. This system greatly escalates the costs of enforcing arbitration rights, and forces persons who do not have sufficient litigation resources to simply abandon their federal arbitration rights.

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[8] (...continued)
Court are treated as discretionary.

[9] Respondents quote a motion in which Petitioners asked the West Virginia Supreme Court to stay the trial court proceedings pending a Petition to this Court as support for the proposition that Petitioners have "contradict[ed] their representation to this Court," and have "acknowledge[d] that the West Virginia Supreme Court of Appeals grants appellate review appropriately in arbitration cases." Opp. 5. Respondents' argument is nonsensical. The fact that the West Virginia Supreme Court, on occasion, has allowed an appeal (or writ of prohibition) concerning an arbitration order hardly means that it "grants appellate review appropriately in arbitration cases."

[10] The three possibilities are (1) moving in the trial court to certify the erroneous arbitration order for interlocutory appeal pursuant to W. Va. § 58-5-2, (2) filing a petition for writ of prohibition with the Supreme Court of Appeals of West Virginia, and (3) filing a petition for appeal with the state supreme court.

In the final analysis, the Respondents have not and cannot dispute that West Virginia does not provide the right to an immediate appeal, as set forth in section 16(a)(1) of the FAA, 9 U.S.C. § 16(a)(1). Rather, West Virginia continues to frustrate federal arbitration law in direct conflict with this Court's prior decisions interpreting the FAA and the decisions of other states' highest courts. This Court should grant the Petition and eliminate these conflicts.

II. The Dismissal Of Petitioners' Independent Federal Action To Compel Arbitration For Lack Of Subject Matter Jurisdiction Serves Only To Enforce The Need For The Petition, And The Order Of Dismissal Was Not A Required Part Of Petitioners' Appendix

Respondents begin their brief (Opp. 2) with the frivolous argument that Petitioners violated Supreme Court Rule 14(i)(ii) by not including in their Appendix a copy of an order in a *different case* which was previously dismissed by the U.S. District Court for the Northern District of West Virginia for lack of subject matter jurisdiction (hereinafter the "FAA Petition").[11] Respondents' argument is frivolous because the portion of Rule 14(i)(ii) cited by Respondents expressly applies only to *relevant* orders *in the same case*. The FAA Petition was not the same case; rather, it was an independent proceeding brought in a different court under sections 3 and 4 of the FAA, 9 U.S.C. §§ 3, 4.[12]

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[11] *American Reliable Ins. Co. v. Stillwell*, Case No. 5:01CV59 (Stamp) (N.D. W. Va.) (complaint/petition filed May 18, 2001).

[12] Rule 14(i)(ii) also provides that certain orders "in companion cases" are to be included in an appendix "if reference thereto is necessary to ascertain the grounds of the judgment." Sup. Ct. R. 14(i)(ii). Respondents correctly do not quote that portion of the rule, conceding as they must that it has no application here.

In addition to citing an inapplicable court rule, the Respondents err by suggesting that the order dismissing the FAA Petition somehow aids their position here. The order dismissing the FAA Petition is irrelevant to this Petition (another reason it is not required in the Appendix), but to the extent it has any significance, it serves only to highlight the damage to federal arbitration rights caused by the West Virginia Supreme Court's refusal to provide a right to appeal. The federal district court dismissed the FAA Petition for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, holding that it was not permitted to act in an appellate capacity to the state trial court. *See* App., *infra*, 9a. If this ruling is correct, Petitioners (and other similarly situated persons) would be barred from compelling arbitration through the federal district court system, and Petitioners' sole avenue for review of the trial court's arbitration order would be in the state appellate system. Consequently, the order dismissing the FAA Petition, if it has any significance to this proceeding, illustrates the need for this Court to grant the Petition and correct West Virginia law.

The Respondents imply that the FAA Petition has some relevance to the state court case because the federal district court, after finding that it had no subject matter jurisdiction, went further and opined that "the insurer waived arbitration." Opp. 3. Respondents fail to mention, however, that the state trial court's order in this case was not based on waiver (rendering the district court's opinion completely irrelevant), and the district court's opinion on waiver could not affect this Petition because it did not apply to all of the Petitioners. App., *infra*, 12a ("any finding of waiver should not apply to American Bankers because American Bankers was not added to the case until the plaintiffs amended their complaint"). Moreover, because the district court held that it lacked subject matter jurisdiction, its discussion of waiver was improper and

unnecessary dicta which, as a matter of law, it not binding on the state court.[13]

III. Respondents' Discussion Of Whether The Arbitration Clause Speaks To "Class Claims" Is Erroneous And Irrelevant to the Petition

Respondents next make the argument that the arbitration provision is unenforceable because it is "silent as to class claims." Opp. 5. Apparently, Respondents believe that an arbitration agreement must "speak to class claims" in order to be enforceable under the FAA. *See id.* Even if this interesting theory had any merit (which it clearly does not),[14] the issue has

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[13] Absent subject matter jurisdiction, "the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)) (emphasis added); *see also Mayor v. Cooper*, 73 U.S. 247 (1867) (holding that if there was no jurisdiction, there was no power to do anything but strike the case from the docket). For a court to address the merits when it lacks subject matter jurisdiction is, "by very definition, for a court to act ultra vires." *Steel Co.*, 523 U.S. at 102. Dismissal of a case for lack of subject matter jurisdiction carries no claim preclusive effects. *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180 (4th Cir. 1989). Moreover, the district court's finding of waiver was erroneous because all Petitioners filed a motion to compel arbitration within 30 days of the Respondents' amended complaint which had changed the entire nature of the dispute. The district court's order has been appealed to the Fourth Circuit.

[14] Under Respondents' theory, a party could avoid an arbitration agreement by simply requesting a class action. This is clearly not the law. *See, e.g., Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-19 (11th Cir. 2001) (rejecting argument that arbitration

(continued...)

absolutely nothing to do with the questions presented in the Petition, and it was waived by the Respondents because they never raised it with the trial court prior to the time the petition for appeal was filed.[15]

IV. There Is No Merit To Respondents' Argument That Application Of West Virginia's "Bargained For" Doctrine Was Consistent With Federal Law

The trial court in this case applied the West Virginia "bargained for" doctrine to single out and invalidate the arbitration provision by requiring that the arbitration clause be separately bargained for. *See* Petition, App. 2a ("Defendants proffered no evidence that the parties to this contract knowingly

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[14] (...continued)
agreement was unenforceable because plaintiffs would not be able to bring a class action); *Johnson v. West Suburban Bank*, 225 F.3d 366, 379 (3d Cir. 2000) (same); *see also Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that [a statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred") (citations omitted). The intermediate state appellate court decision in *Powertel* cited by Respondents (Opp. 6) is easily distinguishable because it invalidated an arbitration clause, unlike the one at issue here, which (i) prohibited the arbitrators from awarding punitive damages or equitable relief, and (ii) was not added to the contract until after the lawsuit was filed. *Powertel v. Bexley*, 743 So. 2d 570, 571-72, 576 (Fla. Dist. Ct. App. 1999).

[15] The Respondents' reference to the McCarran-Ferguson Act in a footnote (Opp. 6 n.2) is yet another erroneous sidebar with no legal relevance. The McCarran-Ferguson Act has absolutely no application here because the FAA would not "invalidate, impair, or supersede any law enacted by [West Virginia] for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

bargained for an arbitration clause"). It is only by completely ignoring the Petition's entire discussion of this Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), that the Respondents can argue that this application of West Virginia law is "consistent with federal law." Opp. 7. Indeed, the Respondents failure to even cite *Allied-Bruce* is a telling concession that they have no substantive response. In addition, the Respondents ignore the conflict with this Court's decision in *Moses H. Cone*, Petition at 21, and they ignore the conflict between the state court's ruling that the FAA "does not apply" and this Court's holding in *Allied-Bruce*. 513 U.S. at 277 (FAA applies to the fullest reach of the commerce clause); Petition at 6 (dispute involves parties from four different states); *id.* at 12-13 (no question that FAA applies).

Finally, Respondents close their opposition with a frivolous Seventh Amendment argument by citing four cases (Opp. 7), none of which have anything to do with arbitration agreements. The Seventh Amendment does not preclude waiver of the right to jury trial through a valid arbitration agreement. *See, e.g., Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992).[16]

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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[16] In addition, this Court has never held that the Seventh Amendment right to jury trial applies to the states.

Respectfully submitted,

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JULY 23, 2002

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AMERICAN RELIABLE INSURANCE COMPANY,
AMERICAN BANKERS INSURANCE COMPANY
OF FLORIDA and
CAMPBELL INSURANCE SERVICES, INC.,

Plaintiffs/Petitioners,

v. Civil Action No. 5:01CV59
(STAMP)

ROBERT STILLWELL and HELEN STILLWELL,

Defendants/Respondents.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, DENYING PLAINTIFFS' MOTION TO COMPEL ARBITRATION, DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND EXPENSES OF LITIGATION, DENYING PLAINTIFFS' MOTION FOR RULE 11 SANCTIONS, DENYING DEFENDANTS' MOTION TO STRIKE AND GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY

I. Introduction

Pending before this Court is the motion to dismiss of defendants/respondents, Robert and Helen Stillwell. Also, pending before this Court is the joint motion to compel arbitration of plaintiffs/petitioners, American Reliable Insurance Company ("American Reliable"), American Bankers Insurance Company of Florida ("American Bankers"), and

Campbell Insurance Services, Inc. ("Campbell") (collectively "plaintiffs"), as well as several other motions.[1] This Court has now reviewed the motions and memoranda in support thereof and in opposition thereto. For the reasons set in this opinion, this Court finds that defendants' motion to dismiss should be granted, plaintiffs' motion to compel arbitration of defendants' claims should be denied, defendants' motion to strike should be denied, defendants' motion for attorneys' fees and expenses of litigation should be denied, Campbell's motion for leave to file surreply should be granted, and American Reliable's motion for Rule 11 sanctions should be denied.

II. Facts

The defendants purchased an American Reliable mobile home owners policy on or about February 9, 1999, which contained an arbitration clause.[2] On April 9, 1999, the defendants sustained a casualty loss to their property.

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[1] The other motions pending before this Court include a motion by defendants Stillwell to strike plaintiffs' reply memorandum in support of motion to compel arbitration, motion by defendants for attorneys' fees and expenses of litigation, motion by plaintiff Campbell for leave to file instanter, a surreply memorandum of law in opposition to defendants' motion to dismiss, and a motion by plaintiff American Reliable for Rule 11 sanctions.

[2] The arbitration clause stated:

> Any and all disputes, controversies or claims of any kind and nature between you and us arising out of or in any way related to the validity, interpretation, performance or breach of any provisions in this policy, and upon which a settlement has not been reached by you and us, shall be resolved exclusively, by arbitration in accordance with the Federal Arbitration Act. (9 U.S.C. § 1, ET SEQ.)

American Reliable Ins. Co. Spec. Mobile Homeowners Policy at 9.

Defendants claim that the loss was covered by the American Reliable insurance policy, but American Reliable claims that the loss was not covered by the policy. Nevertheless, American Reliable settled the plaintiffs' property damage claim for $9,200.00. The defendants then filed a lawsuit in the Circuit Court of Ohio County, West Virginia on February 29, 2000 claiming that American Reliable and certain purported agents breached the insurance policy agreement, engaged in a series of unfair claims settlement practices, acted in bad faith in settling the defendants' claim, used an unlicensed insurance adjuster, and violated West Virginia insurance law. American Reliable and Campbell filed an answer offering 14 affirmative defenses, none of which referred to their desire to arbitrate the claims in accordance with the arbitration clause. The defendants Stillwell subsequently filed a motion for leave to amend their complaint, which was granted on April 2, 2001. The amended complaint added class action allegations and added American Bankers as a defendant. American Reliable and Campbell filed an answer to the amended complaint, which contained 23 affirmative defenses. The 21st affirmative defense did mention the existence of the arbitration clause.

The plaintiffs participated in the state court proceedings for 14 months prior to filing their joint motion to compel arbitration and to stay judicial proceedings on May 1, 2001.[3] The plaintiffs, along with a co-defendant not named in the action before this Court, filed a joint motion to compel

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[3] American Reliable as well as a co-defendant not named in the action before this Court filed a crossclaim against another co-defendant not named in the action before this Court in May 2000. The plaintiffs have also answered discovery, entered into agreements concerning discovery, attended hearings, and have been ordered to produce documents that were withheld from discovery. The state court also entered an order preserving evidence in possession of Campbell and an agreed scheduling order endorsed by American Reliable and Campbell.

arbitration and to stay judicial proceedings in the state court pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.[4] On May 18, 2001, the plaintiffs filed a complaint and petition to compel arbitration in this Court.[5] On June 11, 2001, the state court entered an order denying plaintiffs' motion to compel arbitration and stay judicial proceedings based upon the fact that the state court found the insurance contract to be a contract of adhesion and that there was no evidence that the parties to the contract knowingly bargained for an arbitration clause. On June 13, 2001, after the state court entered its order denying the motion to compel arbitration, a summons was issued and returned executed to this Court as to the defendants. On June 22, 2001, the plaintiffs filed a joint motion to compel arbitration and memorandum in support in this Court. In their memorandum in support of their motion to compel arbitration, the plaintiffs state:

> On June 11, 2001, the state court issued an erroneous ruling which failed to follow Federal law under the FAA and which denied the motion to compel arbitration on the ground that the arbitration clause had not been separately "bargained for." . . . The state court's decision denying arbitration is directly contrary to binding United States Supreme Court authority under the FAA, which firmly holds that a court may not

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[4] Section 3 of the FAA provides for a stay of the proceedings when issues in the proceedings are referable to arbitration and Section 4 allows a party to petition for an order compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement in that civil action.

[5] It should be noted that the plaintiffs could not remove the state court case to this Court because one of the named defendants in the state court action was a resident of West Virginia and therefore complete diversity was not present.

> discriminate against an arbitration clause by enforcing all other provisions of a contract but not its arbitration clause. Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 277 (1995). Accordingly, the Petitioners hereby move this Court to enforce Federal law under the FAA and to enter an Order compelling the parties' dispute to arbitration.

Mem. in Supp. of Mot. to Compel Arbitration at 4. On June 29, 2001, the defendants filed a motion to dismiss and memorandum in support based upon (1) the Rooker-Feldman doctrine; (2) the Younger abstention doctrine; (3) the "wise judicial administration" doctrine; (4) res judicata and/or collateral estoppel; (5) lack of jurisdiction over the subject matter of this action; (6) that the relief sought by the plaintiffs cannot be granted because arbitration cannot be compelled against the policyholders; and (7) the Full Faith and Credit Act, 28 U.S.C. § 1738.

III. Discussion

A. Subject Matter Jurisdiction

The defendants make several arguments in their motion to dismiss, two of which focus on their contention that this Court lacks subject matter jurisdiction over this action. "The FAA does not create independent federal question jurisdiction under 28 U.S.C. § 1331. A federal district court has jurisdiction over a petition filed under the FAA only when the plaintiffs establish an independent basis of jurisdiction, such as diversity of citizenship." Cigna Healthcare of St. Louis, Inc. v. Kaiser, 181 F.Supp.2d 914, 919 (N.D. Ill. 2002) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)). Although defendants argue that this Court does not have jurisdiction over this matter pursuant to 28 U.S.C. § 1332,

this Court finds that complete diversity does exist and the amount in controversy exceeds $75,000.00.

Defendants also contend that this Court lacks subject matter jurisdiction under the Rooker-Feldman doctrine. The Rooker-Feldman doctrine provides that "'a United States District Court has no authority to review final judgments of a state court in judicial proceedings.'" Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198 (4th Cir. 2000) (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). The Rooker-Feldman doctrine also bars consideration of any claim that is "inextricably intertwined" with the state court decision. See id. This means that a federal district court cannot consider a claim that, although not actually decided by the state court, requires the federal court to determine that the state court wrongly decided the issues before it. See id. (citing Plyler v. Moore, 129 F.3d 728, 731 (4th Cir. 1997)). The Rooker-Feldman doctrine also applies to interlocutory orders issued by state courts. See id. at 199. The basic principle of the doctrine is that "'[a] party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.'" Id. at 198 (quoting Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994)).

The defendants argue that the plaintiffs' federal complaint is an impermissible collateral attack on a state court decision. The plaintiffs argue in response that this case is a separate parallel petition under the FAA, which has been expressly approved by federal courts and is not the type of federal appeal of a state court action to which the Rooker-Feldman doctrine applies. Plaintiffs contend that because they filed their federal court petition before the state court ruled on the merits of their motion to compel arbitration, the federal

petition cannot be characterized as an appeal, and therefore, the Rooker-Feldman doctrine does not apply.

The plaintiffs rely on the case of Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997), to stand for the proposition that the Rooker-Feldman doctrine is inapplicable in a case where the federal court petition to compel arbitration was filed prior to the state court denying a motion to compel arbitration. However, the facts in Distajo differ greatly from the facts of the case at hand.

In Distajo, several franchisees brought suit in the state courts in Illinois, Pennsylvania, Massachusetts and North Carolina against Doctor's Associates, Inc. ("DAI") alleging fraud, various breaches of the franchise agreement, and seeking a declaration that the arbitration clause in the franchise agreement was unenforceable. See id. at 128. DAI did not file a motion to compel arbitration in state court, but instead filed a motion to compel in federal court as well as a written demand for arbitration with the American Arbitration Association. See id. In one of the cases, the franchisees moved for and obtained default judgment against DAI because DAI did not appear in the state court action. See id. at 137. After default judgment was obtained, the federal court granted DAI's petition to compel arbitration of those franchisees' claims and entered a preliminary injunction enjoining the franchisees from further prosecuting their state court suit. See id. The Second Circuit reversed the district court's order and vacated the preliminary injunction/temporary restraining order ("TRO"). See id. The district court then entered a TRO enjoining the franchisees from prosecuting their state suit. See id. However, the franchisees did not advise the state court of the TRO. See id. The state court, upon being advised of the Second Circuit's decision lifting the injunction, awarded the franchisees $400,000.00 in damages. See id. The franchisees then argued that the state court judgment stripped the district court of subject matter

jurisdiction to entertain DAI's petition to compel arbitration. See id. On appeal, the Second Circuit held that "DAI filed its petitions to compel arbitration of the franchisees' state actions before the state courts had made any rulings on the merits in those actions." Id. at 138 (citations omitted). On these facts, the Second Circuit found that the district court did not lack jurisdiction under Rooker-Feldman to adjudicate DAI's petitions to compel arbitration. See id.

Another case relied on by the plaintiffs is Central Reserve Life Ins. Co. v. Marello, No. Civ. A. 00-3344, 2001 WL 41129 (E.D. Pa. Jan. 17, 2001). In Marello, Marello filed a complaint in state court against her health insurance company, Central Reserve Life Insurance Company, on June 6, 2000. See id. at *1. Central Reserve promptly filed its federal complaint and motion to compel arbitration on June 30, 2000. See id. It also filed preliminary objections to Marello's state court complaint on July 5, 2000, raising, in part, the arbitrability of Marello's claim under the FAA. See id. The state court overruled Central Reserve's preliminary objections on September 20, 2000 and the federal court subsequently granted Central Reserve's motion to compel on October 4, 2000. See id. The court found that "[a]t the time it was filed, Central Reserve's Motion to Compel Arbitration was neither a direct appeal from an adverse state ruling, nor the functional equivalent thereof." Id. at *4. Accordingly, the court found that the Rooker-Feldman doctrine was not implicated because there was no ruling on the merits from which to appeal. See id.

These cases can be distinguished from the case currently pending before this Court. In this case, although the plaintiffs may have filed a complaint and petition to compel arbitration in this Court before the state court entered its order denying their state court motion to compel arbitration, they did not file a memorandum in support of their motion to compel with this Court until after the state court ruling. Also, the plaintiffs'

memorandum in support of their motion to compel arbitration contends that the state court issued an erroneous ruling, which failed to follow federal law under the FAA. Further, a summons on the complaint was not returned executed as to the defendants until June 13, 2001, which was after the state court ruling.

This Court finds that this particular factual situation renders the plaintiffs' motion to compel arbitration a "functional equivalent" of an appeal from the June 11, 2001 state court decision. This is not a case where the plaintiffs, from the beginning, asked this Court to compel arbitration, but rather one in which the plaintiffs attempted to shop between two forums in order to gain a strategic advantage. Although this Court recognizes that it is proper for a party to file a motion in federal court seeking an order compelling arbitration under the FAA while the underlying state court proceeding remains pending, it is not proper for a party to file two of the same motions in both state court and federal court and to then wait until after the state court renders an unfavorable ruling before the party pursues its motion in federal court. Plaintiffs were clearly looking for the proverbial "two bites of the apple" by filing a motion to compel arbitration in both the state and federal court. Not only do the plaintiffs practically contend in their memorandum in support of their motion to compel that they are appealing the state court order, but their failure to actively pursue their complaint and petition to compel arbitration until after the state court ruling clearly demonstrates that this is a functional equivalent of an appeal of a state court order. Accordingly, this Court finds that the Rooker-Feldman doctrine applies and that this Court lacks subject matter jurisdiction to decide this case.

B. Waiver

However, even if this Court were to find that it did have subject matter jurisdiction, this Court finds that the plaintiffs have waived their right to insist on arbitration. "Under the Federal Arbitration Act, a party may demand a stay of federal judicial proceedings pending exercise of a contractual right to have the subject matter of the federal action decided by arbitration, unless the party seeking arbitration is 'in default' of that right." MicroStrategy Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001) (quoting Maxum Founds., Inc. v. Salus Corp., 779 F.2d 974, 981 (4th Cir. 1985)); see also 9 U.S.C. § 3. Although "default is akin to waiver," any doubts as to whether the party has waived its right to compel arbitration, must be resolved in favor of arbitration. Id. The Fourth Circuit has held:

> A party may waive its right to insist on arbitration if the party "so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." . . . But even in cases where the party seeking arbitration has invoked the "litigation machinery" to some degree "[t]he dispositive question is whether the party objecting to arbitration has suffered actual prejudice.

Id. at 249 (citations omitted). "The party opposing arbitration 'bears the heavy burden of proving waiver.'" Id. at 250 (quoting American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 95 (4th Cir. 1996)).

A court may consider the delay in seeking arbitration when determining whether a waiver occurred. See id. at 250. There is no doubt that the plaintiffs delayed in seeking arbitration for over a year after the complaint was filed. The contention that the claim may be arbitrable was never raised

until the plaintiffs filed their answer and affirmative defenses to the amended complaint and their motion to compel arbitration in state court approximately 14 months after the proceedings began and then filed their motion to compel in this Court 18 days after they filed their state court motion to compel.

However, this Court is aware that "mere delay, without more, will not suffice to constitute a waiver." Maxum Founds., Inc., 779 F.2d at 982. This Court must also look at whether the plaintiffs waived their right to insist on arbitration by virtue of their litigation activities in the state court. See MicroStrategy, Inc., 268 F.3d at 250. This requires the Court to look at whether the plaintiffs' litigation in state court centered around the defendants' arbitrable claims. See id. at 251. This Court finds that the litigation in the state court did, in fact, center around the claims that the plaintiffs now contend are arbitrable. Accordingly, the plaintiffs' litigation activities in the state court can be used in support of the argument that the plaintiffs have waived their right to insist on arbitration.

In determining whether a party waived its right to seek arbitration, this Court must also examine whether the party objecting to arbitration has suffered actual prejudice. "[P]rejudice . . . refers to the inherent unfairness -- in terms of delay, expense, or damage to a party's legal position -- that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." Distajo, 107 F.3d at 134. This Court finds that the defendants have suffered actual prejudice for several reasons. First, even though they were aware of their right to arbitrate, the plaintiffs proceeded to litigate the state court case for a period of 14 months before they even mentioned that they wished to enforce the arbitration provision in the contract. Second, not only did the plaintiffs delay in seeking to compel arbitration, but their litigation in state court centered around the defendants' arbitrable claims. Third, significant discovery has already taken place in the state

court. Fourth, the state court denied plaintiffs' motion to compel arbitration before plaintiffs actively pursued their motion to compel arbitration in this Court. The plaintiffs submitted their motion to compel to one forum and then when they were disappointed with the result in that forum, actively pursued a motion to compel in the other forum. The plaintiffs' willing participation in the litigation in the state court forum was inconsistent with a desire to arbitrate. Accordingly, this Court finds that the defendants have suffered the type of prejudice that supports a finding of waiver. Although the defendants bear a heavy burden of proving waiver and each factor, considered separately, does not support waiver, taken together, these factors demonstrate that the plaintiffs have waived their right to insist on arbitration.

Even if this Court were to conclude that it had subject matter jurisdiction, and even if this Court were to find that the plaintiffs did not waive their right to insist on arbitration, this Court finds that it should abstain from deciding the plaintiffs' motion to compel arbitration. However, before moving on to the abstention analysis, this Court notes that it agrees with the plaintiffs' argument that any finding of waiver should not apply to American Bankers because American Bankers was not added to the case until the plaintiffs amended their complaint on April 2, 2001. American Bankers delayed only a month in asserting arbitration rights. However, because this Court finds that it does not have subject matter jurisdiction over this matter and because this Court finds that it must abstain from ruling on the motion to compel, the fact that American Bankers did not waive its arbitration rights has no effect on this Court's ultimate decision to dismiss the case.

C. Abstention

In their motion to dismiss, defendants argue that this Court should dismiss this action based on Younger v. Harris,

401 U.S. 37 (1971), and the "wise judicial administration" doctrine enunciated in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

In Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983), the Supreme Court addressed the question of whether a federal district court may abstain from hearing a motion to compel arbitration out of deference to the parallel litigation brought in state court. See id. at 935. The Court found that Colorado River provided persuasive guidance in deciding the question before it. See id. The Court in Colorado River held that in certain "exceptional" circumstances, a federal court may abstain from exercising its subject matter jurisdiction due to the existence of a concurrent state court proceeding, based upon "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Colorado River, 424 U.S. at 817 (citations omitted).

The Moses Court identified the four factors in Colorado River as well as two additional factors that a district court must consider when deciding whether to abstain from exercising its jurisdiction due to the concurrent jurisdiction of a state court. These factors are: (1) whether either court has assumed jurisdiction over any res or property; (2) whether the federal forum is any less convenient to the parties than the state forum; (3) the avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether federal or state law provides the rule of decision on the merits; and (6) the adequacy of the state court proceedings to protect the federal plaintiff's rights. The Court stated that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. Moses H. Cone, 460 U.S. at 16.

The first and second factors do not weigh in favor of abstention because the state court did not assume jurisdiction over any res or property and the federal forum is located in the same county and city as the state forum.

The third factor, the avoidance of piecemeal litigation, generally is not an issue in situations where there is a state court proceeding and a parallel federal court proceeding seeking to compel arbitration. See Moses H. Cone, 460 U.S. at 21 (stating that the federal arbitrability issue is easily severable from the merits of the underlying state court action). Also Colorado River stated that "the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." Colorado River, 424 U.S. at 816. However, in this case, the fact that there is a "potential" for conflict, is not the only reason this Court chooses to abstain from exercising jurisdiction. "In analyzing whether a dismissal or stay will further the interest in avoiding piecemeal litigation, we look not for formal symmetry between the two actions, but for a substantial likelihood that the state litigation will dispose of all claims presented in the federal case." Lumen Const., Inc. v. Brant Const. Co., Inc., 780 F.2d 691, 695 (7th Cir. 1986) (citation omitted). In this case, the state litigation has disposed of all claims presented in this Court. Not only has the state court already decided the issue before this Court, but the plaintiffs willingly submitted the issue to the state court for a decision. Because the state court already adjudicated the issues involved in this case, there is much to be gained in judicial economy by abstaining from exercising jurisdiction.

With regard to the fourth factor, the state court obtained jurisdiction of the action more than 14 months before the plaintiffs filed their petition and motion to compel arbitration with this Court. This Court must not only look at which complaint was filed first, but now much progress has been made in the two actions. See Moses H. Cone, 460 U.S. at 22. This

Court has already discussed the fact that there has been substantial proceedings in the state court. Further, the fact that the state court has already decided the motion to compel arbitration demonstrates that the state court proceedings have progressed well ahead of the proceedings in this Court. Accordingly, the fourth factor weighs in favor of abstention.

This Court finds that the fifth factor enunciated in Moses, whether state or federal law provides the rule of decision, weighs in favor of abstention. Although "[f]ederal law governs the construction of contract language concerning arbitrability," see Smith Barney, Inc. v. Critical Health Sys. of N.C., Inc., 212 F.3d 858, 860 (4th Cir. 2000), state law governs a court's determination of whether a valid agreement to arbitrate arose between the parties. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Johnson v. Circuit City Stores, 148 F.3d 373, 377 (4th Cir. 1998) (citations omitted) ("Whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract. . . . In so deciding, the court should apply 'ordinary state-law principles that govern the formation of contracts."). Thus, federal common law is relevant only to provide the basic principle that federal policy favors arbitration and ambiguities are to interpreted in favor of arbitration. West Virginia law determines the question of the validity, revocability, or the enforceability of the agreement to arbitrate. Because the defendants are challenging the validity of the arbitration clause, West Virginia law becomes just as important as federal law in determining whether to compel arbitration. Further, the source of law factor is less significant where the state and federal courts have concurrent jurisdiction. Moses H. Cone, 460 U.S. at 25.

It is difficult for this Court to evaluate the last factor, which is whether the state court proceeding will be adequate to protect the plaintiffs' rights, because the state court has already

ruled on the motion to compel arbitration. The state court order demonstrates that the court considered the plaintiffs' motion to compel arbitration and to stay the proceeding in accordance with the FAA. Although the Supreme Court has never decided whether state courts are obligated to apply 9 U.S.C. § 4, the Supreme Court has stated that "state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act." Moses H. Cone, 460 U.S. at 26. However, plaintiffs never argue that the state court did not have the jurisdiction to decide their motion to compel arbitration; they assert instead that the state court was wrong. This Court rejects the notion that federal courts have any superior abilities over their state court counterparts and has no reason to believe that Judge Wilson did not decide the plaintiffs' motion to compel arbitration and to stay in accordance with applicable federal and state law.[6]

This Court finds that the balance of these factors demonstrates "exceptional circumstances" which weigh in favor of abstention. This action was not filed until more than 14 months after the state court case was filed, the defendants are challenging the validity of the arbitration clause, which implicates state law, the state court forum is adequate to protect the federal plaintiffs' rights, and the state court has already

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[6] This Court does not decide whether it agrees with the state court ruling, but whether this Court agrees is irrelevant because it cannot act as an appellate court to the West Virginia court. On September 28, 2001, the state court entered an order stating that "the order denying arbitration entered on June 11, 2001, is appealable by writ of prohibition or by direct appeal under W. Va. Code § 58-5-1 . . . ." Defs.' Ex. 1 to Supp. Memo. in Support of Mot. to Dismiss. Therefore, if the plaintiffs believe that the state court made an erroneous ruling, they may file an appeal with the West Virginia Supreme Court of Appeals. Further, even though the West Virginia Supreme Court's decision to hear an appeal is discretionary, it is not a reason for this Court to act as an alternative appellate court.

ruled on the issue before this Court. To retain jurisdiction over the plaintiffs' petition to compel arbitration, while a state court has already ruled on the same motion, would not constitute "wise judicial administration." Colorado River, 424 U.S. at 817.

D. The Other Motions

Because this Court finds that defendants' motion to dismiss should be granted, plaintiffs' motion to compel arbitration should, accordingly, be denied.

This Court also finds that defendants' motion for an award of attorneys' fees and expenses of litigation should be denied because this Court does not believe that statutory or common law permits this Court to award attorneys' fees pursuant to Federal Rule of Civil Procedure 54(d).

This Court further finds that American Reliable's motion for sanctions pursuant to Federal Rule of Civil Procedure 11 should be denied because the defendants' motion for attorneys' fees was not filed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation. Although this Court does not agree with the defendants' argument that attorneys' fees should be granted, this Court does not find that the defendants' argument was frivolous.

This Court further finds that defendants' motion to strike plaintiffs' reply memorandum in support of motion to compel arbitration should be denied because the plaintiffs' reply was timely filed.

Lastly, there being no objection to plaintiffs' motion for leave to file instanter a surreply memorandum in opposition to defendants' motion to dismiss, the plaintiffs' motion should be granted.

IV. Conclusion

For the reasons set forth above, the defendants' motion to dismiss is hereby GRANTED. This Court further finds that plaintiffs' motion to compel arbitration is DENIED; defendants' motion for attorneys' fees and expenses of litigation is DENIED; plaintiffs' motion for Rule 11 sanctions is DENIED; defendants' motion to strike is DENIED; and plaintiffs' motion for leave to file a surreply is GRANTED. It is further ORDERED that this action be DISMISSED and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit copies of this order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: March 18, 2002

/s/ FREDERICK P. STAMP, JR.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE